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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-732

JAMES EDWARD DYE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The issues presented by the petition are (1) whether the district court erred in ruling that petitioners charged with possession of stolen whiskey, had no standing to challenge the admissibility of evidence that petitioners allege was seized in violation of the Fourth Amendment, and (2) whether, as to petitioner Dye, (a) the district court erred in denying his motion for a new trial based on newly discovered evidence, and (b) the court of appeals failed to consider several of his assignments of error.

After a jury trial in the United States District Court for the Eastern District of Tennessee, petitioners Burnette, Collins, Cupp, Ervin, Galyon, Hughes, and Lambert were convicted of conspiring to steal whiskey, in violation of 18 U.S.C. 371 and 659, and (except for Collins) of

possession of stolen whisky, in violation of 18 U.S.C. 2 and 659. Petitioners Burnette and Ervin were also convicted of stealing the whiskey, in violation of 18 U.S.C. 2 and 659. Petitioner Dye was convicted of being an accessory after the fact and of misprison of felony, in violation of 18 U.S.C. 3 and 4. Petitioners were sentenced to prison terms as follows: Burnette and Cupp, eight years; Collins, three years; Dye and Ervin, five years; Galyon, two years; Hughes, eighteen months; Lambert, four years. The court of appeals affirmed all convictions except that of petitioner Burnette for theft of whiskey, which it reversed (Pet. App. A).

The evidence showed a conspiracy by petitioners (except petitioner Dye) to steal a tractor-trailer loaded with Jack Daniels whiskey from a distillery in Lynchburg, Tennessee. On July 27, 1972, the trailer was loaded at the Lynchburg distillery with 1,250 cases of Jack Daniels whiskey for delivery to a warehouse in North Carolina. It was subsequently reported missing and was found empty in Monroe County, Tennessee, three days later. Meanwhile, in the early evening of July 29, two Knox County, Tennessee, deputy sheriffs, acting on a tip, went to the rear of a warehouse in Knoxville and observed a U-Haul van parked next to the building in a public alley. The body of the truck was padlocked, but the cab was unlocked and the key was in the ignition. They were joined by the chief deputy sheriff, who then left to obtain a search warrant. When he returned, a door at the rear of the warehouse was forced open and 100 cases of Jack Daniels whiskey were found in the building. The officers arranged for a truck to be rented, and when it was brought to the location they loaded the whiskey from the building into the truck. This work was completed by about 4:00

a.m. on July 30 (Tr., Motion to Suppress, p. 15); at that time both the U-Haul van, which had remained unopened, and the other rental truck that had been loaded with the whiskey were taken to the county jail. The U-Haul van was turned over to FBI agents unopened and unsearched.

On July 31 the FBI agents had a key made for the padlock on the rear of the truck, and on August 2 they obtained a search warrant from a federal magistrate on the basis of a detailed affidavit (Pet. App. G). The truck was searched on August 3, and 416 cases of Jack Daniels whiskey were removed from it. This whiskey was identified as part of the shipment stolen on July 27 or 28.

At a pretrial hearing, the prosecution stated that it would not rely on any whiskey taken from the warehouse and stipulated that the only whiskey that would be introduced in evidence was a portion of that taken from the U-Haul by the FBI (Tr., Motion to Suppress, p. 95). Petitioners moved to suppress the evidence from the van on the ground that it was "tainted" by the alleged illegal prior search of the warehouse and seizure of the van by the Tennessee authorities.[1] At a pretrial hearing on the motion, only petitioners' co-defendant Frye (who

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[1]It appeared that, while the chief deputy sheriff had been alerted by an informant to the fact that Jack Daniels whiskey had been loaded and unloaded at the warehouse "practically all day" on July 29 (Tr., Motion to Suppress, p. 32), the search warrant he obtained made no reference to the whiskey but was for an outboard motor (*id.* at 29, 37). It was also uncertain whether the search warrant was obtained prior to any entry into the warehouse or subsequent to an initial intrusion (*id.* at 37-38).

was subsequently acquitted) testified. He was a service station operator who stated that he had leased the U-Haul on July 29 to a person identifying himself as Douglas White. Petitioners made no claim at the hearing to an interest—either proprietary or possessory—in the U-Haul or its contents.

The district court concluded that petitioners were without standing to seek suppression of the whiskey and that, even if they had standing, there was probable cause for issuance of the federal warrant that was untainted by the previous activities of the state officers. The court of appeals agreed that petitioners had failed to establish standing; it therefore did not reach the issue of probable cause or "taint" (Pet. 33).

1. Petitioners contend both that they were in "constructive" possession of the U-Haul and its contents at the time of the FBI search and that, in any event, they had "automatic" standing to challenge the search.[2] Their claim of constructive possession is based upon evidence at trial that showed that they had been observed loading a portion of the stolen whiskey into the U-Haul earlier on July 29 (Tr. 249-252; Pet. App. H). The truck and its contents, they assert, were then "removed from [their] possession * * * as the direct result of the illegal search of the warehouse" (Pet. 12).

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[2]As indicated, only the petitioners charged with possession of stolen whiskey challenge the ruling of the district court denying them standing (Pet. 3-4). Of these petitioners, only Cupp received an enhanced sentence as a result of his conviction of possession; the others received concurrent sentences on the conspiracy and possession counts (Petitioner Ervin on the conspiracy, theft, and possession counts).

The fact that petitioners were in actual possession of the whiskey earlier on July 29 was, of course, known to them and should have been presented to the court at the supression hearing. The trial court was not obliged to reopen the matter of their standing based solely on their renewed objection to admission of the evidence at the close of the prosecution's case; see Wright, *Federal Practice and Procedure; Criminal,* § 676. Moreover, petitioners' earlier possession of the whiskey on July 29 does not demonstrate that it was "removed from [their] possession" at 4:00 a.m. on July 30; nor is it clear that the removal of the U-Haul was the "direct result" of the warehouse search. As the court of appeals observed (Pet. App. 30):

> When the state officers took possession of the U-Haul truck and drove it to the police station, none of the defendants was present. The police had been in the area for nearly nine hours, and no one had appeared to claim the truck. Though the body of the truck was padlocked, the ignition key was in the cab which was unlocked. The close proximity of the truck to the warehouse, and its apparent abandonment were justification for removing the truck from the public alley at 4:00 a.m. Compare *Cady* v. *Dombrowski,* 413 U.S. 433, 442-443 (1973).

Indeed, at no time prior to the search of the van on August 3, or at any time thereafter, did petitioners assert an interest in the van or its contents.

Petitioners contend, however, that they were not required to establish an interest in the U-Haul, but possessed automatic standing under the doctrine of *Jones v. United States,* 362 U.S. 257. For the reason stated in

Brown v. *United States*, 411 U.S. 223, however, this contention is without substance. As in *Brown*, the Court need not decide whether "the continued survival of *Jones*' 'automatic' standing" is warranted in the wake of *Simmons* v. *United States*, 390 U.S. 377 (411 U.S. at 229). For, as in *Brown*, petitioners "were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence *at the time of the contested search and seizure*" (*id.*, emphasis added.). The indictment charged petitioners with possession of stolen whiskey on or about July 28 (Tr. 8). There was evidence that petitioners were seen unloading whiskey from the hijacked trailer into the warehouse on July 28 (Tr. 241-244). There was also, as noted, evidence that they loaded part of it into the U-Haul on July 29. But, as already indicated, the U-Haul was not observed until the evening of that day, parked in an alley with the keys in the ignition, and was not seized until nearly nine hours later, following surveillance during which no one claimed possession of it. By the time of the seizure, petitioners' possession of the van had to every appearance terminated. Thus, as the court of appeals concluded (Pet. App. A, p. 33)

> The defendants * * * have not established that they are the ones "against whom the search was directed" or that they had a right of privacy with respect to the U-Haul truck or its contents. See *Jones* v. *United States*, 362 U.S. at 261.

Even assuming, however, that petitioners had standing to seek suppression of the whiskey, their motion to suppress was properly denied because there was probable cause for the issuance of the federal search warrant. The affidavit (Pet. App. G), besides attesting to

the theft of the whiskey, stated that "a reputable citizen of Knoxville, Tenn., who desires to remain anonymous," had observed Jack Daniels whisky being unloaded from a tractor-trailer in the alley behind the Knoxville warehouse on the morning of July 29 and a U-Haul van driven into the alley later that day. The chief deputy sheriff of Knox County advised the federal agents that "a confidential source * * * who had furnished reliable information on one other occasion," witnessed Jack Daniels whiskey being loaded from or into the U-Haul truck on the same day. The agents also established that the U-Haul van had been leased to a person who had shown no identification and had given a false address.

Petitioners insist that the sole information in the affidavit involving the loading of the whiskey into the U-Haul came from one (the chief deputy sheriff) "who had himself participated in the illegal search of the warehouse * * * and the seizure of the U-Haul truck" (Pet. 12), and that without this "tainted" information the affidavit did not contain probable cause. But the ultimate source of the information received from the sheriff was not the sheriff, but a confidential informant who had once previously proven reliable; and the presence of the U-Haul at the warehouse on the day on which the stolen whiskey was unloaded was confirmed by a disinterested citizen as well as another deputy sheriff. We submit that the affidavit contained probable cause, independent of knowledge or inferences derived from the search of the warehouse, to believe that the U-Haul contained stolen whiskey.

2. Petitioner Dye contends that he was denied due process when the district court rejected his motion for a new trial without granting him an evidentiary hearing at which to present polygraph evidence supporting the alleged recantation by the witness McFee of his trial testimony.

The district court (Pet. 42-53) carefully considered the deposition and other post-trial statements of McFee, which asserted, *inter alia*, that through promises, undue pressure, and corrupt means a federal agent had perverted McFee's testimony. The court concluded that these allegations were refuted both by detailed affidavits submitted by the government and by the record as a whole (Pet. 48). The court referred to particular affidavits, including that of a fellow prisoner of McFee following the latter's conviction, which showed a scheme by McFee to discredit his prior cooperation with the prosecution in an effort to ingratiate himself with the other defendants (Pet. 49). The court noted as well that McFee's purported change of testimony occurred after he and petitioner Dye had spent some three days together in the home of McFee's mother (Pet. 52). In these circumstances, the court did not abuse its discretion in denying the request for an evidentiary hearing as well as the motion for a new trial. *United States* v. *Johnson*, 327 U.S. 106; *United States* v. *Hoffa*, 382 F. 2d 856, 866 (C.A. 6).

3. Finally, petitioner Dye claims that he was denied due process because, he alleges, the court of appeals failed to consider five issues raised in his appeal (Pet. 8). This claim is founded on a sentence that appeared in the original decision of the panel, which suggested that the court found it unnecessary to reach several issues raised by Dye.[3] This identical contention was made in

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[3]The sentence read as follows (Pet. App. 39, 40):

> Dye has raised a number of other issues in his separate brief, but these either were not raised in the district court or concern themselves with matters of evidence, instructions and trial rulings which are not likely to be identical upon a retrial of his case.

The sentence was obviously included in the opinion by mistake, since Dye's conviction was affirmed.

Dye's petition for rehearing in the court of appeals. In response to that petition, the court of appeals ordered the deletion of the sentence (Pet. App. B) and entered a separate order denying Dye's petition for rehearing.[4] Thus, the claim that the court of appeals failed to consider issues raised by Dye is without merit, and in any event none of those issues warrants review by this Court.

Although the petition does not specify the issues that Dye contends were not considered, presumably they are the same issues raised in the petition for rehearing. One issue involved failure of the trial judge to give an instruction, but the record shows that petitioner did not object to the omission (Tr. 812-816) and, in any event, was not prejudiced by it[5]. Three other issues pertained to the denial of petitioner's motion for a judgment of acquittal

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[4]A copy of Dye's petition for rehearing in the court of appeals is being lodged with the Clerk of this Court. In denying Dye's petition for a rehearing, the court of appeals rejected his present contention. See Appendix, *infra*.

[5]The jury was not expressly instructed that it must find that Dye had actual knowledge of McFee's participation in a crime in order to convict him of being an accessory after the fact in helping to conceal McFee (Tr. 787). It was, however, told that "the theory of the Government [was] * * * that Dye knew that * * * McFee was the thief who participated in the theft of the whiskey * * * " (Tr. 802). It was also expressly told that it must find such actual knowledge with respect to the next count, misprison of felony, and it found Dye guilty of that offense.

on the ground of insufficient evidence; they were covered by the express finding by the court of appeals that, except for petitioner Burnette's conviction for theft, the evidence supported the verdict of the jury on all the counts (Pet. App. 25-26). The final issue involved a reference at trial to a prior conviction of Dye's some seventeen years earlier. The reference occurred in the course of the government's cross-examination of a character witness called by Dye. The sole purpose of the reference was to ascertain whether the witness was aware of the conviction (Tr. 363-364). The reference to the conviction was consistent with the well settled principle, illustrated by this Court's decision in *Michelson* v. *United States*, 335 U.S. 469, 483, that "* * * the prosecution has a right to test the qualifications of the witness to bespeak the community opinion." Cases concerning the use of prior convictions for purposes of impeachment of a defendant, upon which Dye relied in his court of appeals brief, are inapposite. Moreover, the court instructed the jury "to disregard any reference to a prior conviction of the defendant Dye for any purpose" (Tr. 776).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.

1933-1975-02

APPENDIX

OCTOBER 14, 1974
JOHN P. HEHMAN, CLERK

No. 73-1876

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES EDWARD DYE
Defendant-Appellant

v.

ORDER

UNITED STATES OF AMERICA
Plaintiff-Appellant

BEFORE: EDWARDS, CELEBREEZZE AND LIVELY, Circuit Judges.

Upon consideration of the petition for rehearing filed herein on behalf of the defendant-appellant James Edward Dye, it is concluded that no issues are raised therein which were not considered by the court upon the original submission of this case. The court further concludes that the petition for rehearing does not disclose any error in the opinion of the court prejudicial to the rights of defendant-appellant James Edward Dye.

It is therefore ORDERED that the petition for rehearing be and it hereby is denied.

ENTERED BY ORDER OF THE COURT

(signed) JOHN P. HEHMAN

Clerk